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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the	)	
Telecommunications Act of 1996:	)	
	)	CC Docket No. 96-115
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other Customer	)	
Information	)	

U S WEST, INC.'S OPENING COMMENTS

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GLOSSARY OF TERMS

AT&T	AT&T Corp.
BNA	Billing Name and Address
BOC	Bell Operating Company
CMR	Commercial Mobile Radio
CMRS	Commercial Mobile Radio Services
FCC	Federal Communications Commission
CPE	Customer Premises Equipment
CPNI	Customer Proprietary Network Information
GTE	GTE Service Corporation
IXC	Interexchange Carrier
LOA	Letter of Authority
LEC	Local Exchange Carrier
NYNEX	The NYNEX Telephone Companies
OVS	Open Video System
PCS	Personal Communications Service
RBOC	Regional Bell Operating Company
U S WEST	U S WEST, Inc.
USWC	U S WEST Communications, Inc.
VMS	Voice Mail Service

SUMMARY

Herein, U S WEST proposes an interpretation of Section 222 permissible under the literal language of the statute and promotive of the public interest. We urge the FCC to take a broader approach to interpreting the statute than suggested in the instant Notice. Rather than finding that there are a number of "discrete services" contemplated by Section 222(c)(1)(A), we propose that the FCC find that a single telecommunications service package is contemplated (a proposal finding support in the language of the existing Cable Act, 47 USC Section 551). Accordingly, telecommunications carriers can use CPNI derived from components of that package in the design, development and marketing of any component of that single package.

In the event the FCC determines that the statute compels the conclusion that more than one telecommunications service was contemplated by Congress when it enacted Section 222, we propose the FCC find only two telecommunications services, i.e., local and interexchange, allowing carriers themselves to create more differentiated service buckets. Thus, for example, CMRS could be a single service (a position likely to be taken by those providers who are singularly CMRS providers), while a floating service concept would be permitted for those LECs and IXCs that offer CMRS as part of an integrated telecommunications service package solution. This interpretation, again, would support current marketplace expectations and delivery channels. Thus, its public interest benefits are evident.

Furthermore, in line with the literal language of Section 222(c)(1)(B), we propose that the FCC hold that CPE and some enhanced services can also share in, and make use of, the CPNI associated with the telecommunications service package. Such is an interpretation supported not only by the statutory language but by long-standing FCC public interest findings.

With respect to the approval requirements of Section 222(c), U S WEST argues that no approval is required by Section 222(c)(1)(A) or (B) uses. Thus, to the extent the FCC broadly construes the term "the

telecommunications service" and allows CPNI use for CPE and enhanced services, for many telecommunications carriers and their customers it will be business as usual -- a positive market and public interest result. If, however, the FCC persists in its tentative conclusion that there are at least two discrete telecommunications services contemplated by Section 222(c)(1)(A), the FCC should find that tacit approval, based on the existing business relationship, exists at least for CPNI sharing between or among the services.

In those instances where a broader approval is deemed necessary for CPNI use (e.g., between telecommunications and non-telecommunications services or companies), telecommunications carriers should be permitted to send out a one-time disclosure describing fully their CPNI uses and practices. Unless a customer objects, approval should be deemed secured.

U S WEST's proposals are supported by long-standing FCC findings with respect to CPNI and market expectations. They are also supported by Congressional enactments in the area of privacy with respect to the cable industry. Indeed, the existence of both supports the notion that Congress did not mean to act in an unduly interventionist way with respect to the existing telecommunications market. Rather, its intention was to have a common set of practices and expectations with respect to all carriers in that market.

The FCC can accomplish this Congressional objective in a manner that promotes the quality delivery of products and services, with the least amount of market interference. It can move away from its past practices of establishing rules with high levels of product and provider segmentation. While such might have been appropriate where regulation was the order of the day, it would be a particularly inappropriate approach with respect to implementing the deregulatory 1996 Act. The FCC should take this opportunity to move away from its prior approach, to construe Section 222 in a more holistic fashion, and to allow the benefits of internal company information sharing to redound to the benefit of the public.

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U S WEST, INC.'S OPENING COMMENTS

I. THE FCC SHOULD CONSTRUE SECTION 222 IN A WAY THAT DOES NOT ADVERSELY AND MATERIALLY COMPROMISE CUSTOMER MARKET EXPECTATIONS AND COMMERCIAL PRACTICES

The instant Notice proposes an unduly conservative approach to interpreting Section 222 of the 1996 Act. While not patently unreasonable, if the final FCC rules were to incorporate the most conservative aspects of the Notice, i.e., separate "discrete services" and written prior authorization (Notice ¶¶ 20-23, 28-29), the public interest would be harmed significantly. Neither the statutory language, nor Congressional intent, requires such an interpretation. The FCC should not enact these proposals into final rules.

As the FCC is aware,[1] U S WEST believes an interpretation of Section 222 that accommodates marketplace desires and results in minimum interference with ongoing, satisfying commercial relationships is entirely possible. Such would interpret the phrase "the telecommunications service" with maximum flexibility to

[1] See Notice n.5. See also Stafford Apr. 4, 1996 Ex Parte Letter.

mean a single "telecommunications service package." Alternatively, such interpretation would create no more than two discrete telecommunications services, i.e., local and interexchange.[2]

Such interpretation would also make the "approval process" as simple and unconfusing as possible for customers, allowing for tacit consent as an appropriate model or a combination of tacit consent and written disclosure. Below, these concepts are discussed in greater detail.

Construction of Section 222 should be guided by existing market expectations and future public interest benefits. Both require that a company providing telecommunications service maximize its resources, including its commercial business information, to bring innovative, quality products to market as solutions to customers' needs.

Customers look to telecommunications companies to satisfy their telecommunications needs through a multitude and variety of proposed solutions. Residential consumers, in particular, do not have telecommunications purchases uppermost in their minds. Thus, informing customers of options available to them, and making the telecommunications products and services they might desire easy to buy and use, are critical to satisfying their market needs.[3]

Providing solutions to customers' telecommunications needs requires that a business know its customers individually and in the aggregate. The former is necessary for educated discussion with the customer[4] as well as

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[2] It is clear that, at least preliminarily, the FCC is taking a more conservative approach than U S WEST has proposed. Thus, at certain points in these Comments, particularly in Section II, we recommend approaches aligned with the tentative conclusions outlined in the Notice, but suggest modifications.

[3] 1991 USWC Comments, CC Docket No. 90-623, at 82 and Appendix B at 6-7.

[4] "Customers . . . rightfully expect that when they are dealing with their carrier concerning their telecommunications services, the carrier's employees will have available all relevant information about their service." House Report No. 104-204 at 90 (104th Cong., 1st Sess.).

target marketing.[5] The latter information is particularly critical with respect to product development and planning,[6] predicate steps to sales activity.

With the market as the guidepost, it is important to recognize that Section 222, **like the FCC's existing CPNI rules**, was fashioned with a view toward balancing "considerations of efficiency, competitive equity, and privacy."[7] In this regard, they share the same public interest motivations. Thus, those considerations which guided the FCC's Computer II and Computer III decisions should educate the FCC's interpretation of Section 222.

While the FCC's current CPNI rules, and the findings that support them, cannot (and should not) be transported, uninvestigated, into a proceeding calling for statutory construction of a particular piece of legislation, neither can they be ignored. The FCC's existing CPNI rules allow broad use of information, building on reasonable assumptions about customers' intentions and expectations. The market and public policy benefits of those rules have been detailed time and again.[8] Those findings provide a strong foundation for the FCC's investigation into

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[5] Phase II Supplemental NPRM, CC Docket No. 85-229, rel. June 16, 1986 ¶ 55 (CPNI can be useful in targeting customers for product offerings).

[6] Depriving carriers of access to CPNI would not "permit the [carriers] to engage in the type of integrated activities [sic], including joint planning and response to customer needs, that many customers apparently desire and that [carriers] could, [but for unduly constraining] requirements, efficiently provide." BOC CPE Relief Order, 2 FCC Rcd. 143, 148 n.86 (1987); see also AT&T CPE Relief Order, 102 FCC 2d 655, 692-93 ¶ 64 (1985). For example, the consumer group is not homogenous. Within it, there can be significant segmentation and differentiation based on geography. 1991 USWC Comments at 83. Use of CPNI allows for such differentiation in product design and marketing.

[7] See Notice ¶ 24 and n.60 (citing to Joint Explanatory Statement at 205). Computer III Remand Order, 6 FCC Rcd. 174, 182 ¶ 54 (1990); BOC CPE Relief Recon. Order, 3 FCC Rcd. 22, 24-25 ¶ 20 (1987).

[8] For example, the FCC stated in its Phase II Recon. Order, 3 FCC Rcd. 1150, 1162-63 ¶ 97 (1988), that its "CPNI rule is a means of promoting [efficient service provisioning] while protecting the interests of users and enhanced service competitors. To the extent that the BOCs use CPNI to identify certain customers whose telecommunications needs are not being met effectively and to market an appropriate package of enhanced and basic services to such customers, customers would be benefited. Furthermore, such integrated system solutions offered by the BOCs could generate sales that benefit the enhanced services industry generally, since, after having been approached by a BOC's joint sales force, major customers are likely to solicit offers from competing vendors of enhanced services. Efforts by the BOCs that make consumers more aware of the benefits of enhanced services could expand the market for these services and competing products to the benefit of consumers and

the proper interpretation of Section 222 and provide substantial guidance on how to craft an interpretation that does not disrupt current marketplace expectations, efficiencies, or business practices.

A. A Statutory Interpretation Consistent With Marketplace Expectations And Satisfying Commercial Relationships Is Entirely Feasible And Should Be Adopted

A broad, rather than a narrow, interpretation of Section 222 would be in accord with the public interest, as that interest has been identified by the FCC itself in numerous prior proceedings and as it is realized daily in ongoing consumer behavior. Quite simply, consumers want one-stop shopping. The FCC has repeatedly acknowledged this.[9]

Through its past regulatory actions (and non-actions) with respect to CPE, enhanced services,[10] and wireless offerings,[11] the FCC has facilitated the accommodation of consumers' one-stop shopping requirements, allowing it to grow and flourish. And, telecommunications carriers have adapted their business practices to accommodate this abiding market demand.

Telecommunications carriers, thus, provide integrated solutions to consumers' needs in a "telecommunications service" package suited to individual consumers. Wireline services are offered alongside

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providers alike. Second, the CPNI possessed by the BOCs does not endow them with an overwhelming competitive advantage for purposes of marketing enhanced services. . . .Third, the existing CPNI rule adequately protects the proprietary interests of network service customers[.] . . .And fourth, the existing rule is consistent with the CPNI rules governing BOC provision of CPE and AT&T's provision of CPE and enhanced services. This will make it easier for customers to understand and elect their CPNI options." (Footnotes omitted.)
One need only engage in elliptical re-phrasing (changing "BOCs" to "carriers" and substituting various service or product identifiers) to arrive at the conclusion that an FCC interpretation of Section 222 that is substantially similar to the existing rules would be in the public interest.

[9] See Appendix A citing to instances where the FCC has made such findings.

[10] The FCC specifically structured its rules so as not to negatively impact internal information sharing, integrated product planning and design, or joint marketing.

[11] All telecommunications carriers in the United States, other than the BOCs, freely include wireless options -- including cellular -- within their telecommunications service packages.

wireless service options; different types of CPE are offered depending upon the service package chosen; enhanced services are offered in conjunction with both wireline and wireless services.

The success of integrated operations and customer solutions has, as its foundation, information sharing just as much as joint sales opportunities. As the FCC has recognized, restricting access to CPNI for purposes of product offerings is a form of passive structural separation.[12] Such separation has repeatedly been found by the FCC not to be in the public interest.[13] Depriving a business of the ability to use its telecommunications information for purposes of planning, deployment, marketing, and sales of services "used in" the provision of telecommunications services would be contrary to the public interest.

Section 222 is supported by no Congressional findings and no empirical evidence that customers purchasing telecommunications products and services suffer from "privacy angst." Especially when CPNI is used internally within a single corporate entity (including those integrated vertically or horizontally), there is nothing to suggest customers want to be required to take affirmative action to allow CPNI to be used in developing new services to meet their needs. An interpretation of Section 222(c) construing the phrase "the telecommunications service" as encompassing a single "telecommunications service package" would eliminate the need for customer "approval" for use of CPNI between or among the various options or components of that package.

Should the FCC feel constrained, however, to find that the 1996 Act contemplates more than one telecommunications service, it should minimize the predictable adverse impact of that determination on market expectations and satisfaction by holding that implied customer approval exists for the sharing of information

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[12] See Appendix A for citations to FCC Orders holding this to be the case. The vitality of the findings in those Orders is not in any way diminished by the enactment of Section 222. Indeed, it would be arbitrary for the FCC to fail to acknowledge the adverse public welfare consequences of CPNI restrictions, on both businesses and consumers.

[13] See Appendix A.

between (or among) those services, within a single corporate family.[14] Such a finding would minimize adverse impacts on the production and delivery of quality telecommunications services to customers.[15]

For information sharing of a broader scope (e.g., beyond telecommunications, between the telephony and cable entertainment operations of a company), a more formal approval mechanism might be required (unless there were a "necessary or used in" connection that was, in fact, established between the telecommunications and cable offerings). A carrier interested in broader CPNI use should be permitted to provide a full and fair disclosure to its customers as to how CPNI in its possession will be used, providing customers with an opportunity to request otherwise. Once having made such a disclosure, and absent any customer response, a carrier should be permitted to use the CPNI in its possession in accord with the disclosed uses.

Section 222 can reasonably be interpreted to sanction a disclosure/opt-out mechanism. Customers who prefer not to have their information used internally by a corporation can request that their information not be so used. We suspect those customers will be few and far between.

The benefits of broad, internal information sharing are self-evident. All offerings potentially benefit from such sharing,[16] producing obvious public welfare and market benefits. For example, in a statistically valid survey done this year, U S WEST learned that overall, 70% of those surveyed supported certain types of integrated cable/telephony offerings, with the approval rating rising to 83% within certain customer segments. Clearly, the

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[14] The FCC has made similar findings in other contexts. See discussion below at Section III. Despite the contextual differences, the fundamental soundness of the FCC's conclusions is unassailable.

[15] U S WEST suggests this approach, in part, because a different finding will lead to consumers receiving multiple written notifications from multiple carriers. While this might happen, in any event (see discussion below about horizontally integrated companies), a tacit approval finding for telephony and ancillary uses minimizes the number of communications, since there may be telecommunications carriers that engage in no lines of business or commercial activities other than those included in § 222(c)(1)(A) and (B).

[16] Of course, there may be times when information turns out to be irrelevant to an offering because a correlation cannot be determined between the two service offerings. However, even that information is of significance to a business trying to satisfy customers

majority of customers would support, rather than oppose, information sharing leading to such offerings.[17] Asking customers to provide "affirmative" approval for such use simply asks them to perform a function that they need not perform for any other business in the United States and to take their valuable time to do it.[18]

B. Section 222, A Privacy Statute On Its Face, Should Be Construed Similarly To The Cable Privacy Subscriber Act, As The Elements Of Each Are Strikingly Similar

American consumers recognize privacy disclosure/notification models. Such are used extensively by the direct marketing industry. Furthermore, their use by the cable industry has set a market expectation with respect to the contents of the notification itself. A similar notification, then, by telecommunications carriers would be supported by a type of "message symmetry," bringing with it a greater likelihood that the disclosure will be read and understood.

Congress obviously did not intend to impose on the telecommunications industry a "privacy statute" model significantly different from that imposed on the cable industry -- an industry that, under the very same Act, will be in competition with traditional carriers.[19] Indeed, the more reasonable, and constitutionally permissible, interpretation of Section 222 is that Congress intended it to accomplish results similar to 47 USC Section 551, the privacy model imposed on the cable industry. Indeed, given the essential similarities between the Acts, such Congressional intent is almost inescapable. Thus, the Cable Act's requirements provide the most appropriate model for interpretive guidance.

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[17] Attached as Appendix B are copies of newspaper articles clearly suggesting that cable companies also see the benefit, both internally and externally, of such information sharing.

[18] 1991 USWC Comments, Appendix B at 6-7. And compare results of 1994 Louis Harris & Associates and Dr. Alan F. Westin for MasterCard International, Inc., and VISA, U.S.A., Inc. Survey ("1994 Harris Survey") on affiliate sharing referenced in 1994 USWC Comments, CC Docket Nos. 90-623 and 92-256 at 17-19.

[19] Indeed, the establishment of materially different commercial and market requirements would pose constitutional problems under the Equal Protection clause. Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985).

A schematic of the salient provisions of the two Acts is found below. While the Acts are worded somewhat differently,[20] their approaches are similar.[21] Commercial business information, that also happens to be individually-identifiable to a customer, can be used:

Cable Act 47 USC § 551	Telecomm Act 47 USC § 222
• to render a cable service	• in the provision of the telecommunications service
• or other service (including any wire or radio communication service using facilities of a cable operator)	• or services necessary to, or used in, the provision of such telecommunications service
• shall provide notice regarding the nature of the information held, whether disclosures occur, etc.	• with the approval of the customer
• shall not disclose without written or electronic consent	• shall disclose to any person upon affirmative written consent

A cable operator is free to collect and use personally identifiable information for rendering a "cable service" (a singular term). The Cable Act does not divvy up that "service" into "traditional service" categories, such as "basic tier," "expanded basic tier," and "premium tier." Rather, the service being addressed is the cable service package the customer ultimately purchases. The same construction should apply to the term "the telecommunications service."

[20] For example, the Cable Act does not address the use of customer information in a company's possession. Rather, it addresses the collection of the information. But, like the 1996 Act, it does address disclosure to third parties.

[21] Aggregate information is addressed separately below at Section III.B.

A cable operator can make use of its individually identifiable subscriber information not only for "a cable service," but for other services as well, which include wire or radio communications services using the cable facilities. Thus, a cable company/carrier can, under the Cable Act, use its subscriber information for ancillary services provided over its network. It can also use that information to provide CPE or other types of services, if they are necessary for the provision of the service.[22]

Under the Cable Act, cable companies must provide subscribers with notice of their information practices, including the kind of information collected, how it is to be used, how long it is maintained, etc. Once the disclosure is made, the process is over. Section 222 should be construed to require no more from telecommunications carriers.[23]

Finally, the Cable Act requires that, absent certain identified exceptions, before a cable operator can release individually identifiable cable viewing information to a third party, a subscriber must provide "written or electronic consent." Under the Cable Act, it is the cable operator -- not the subscriber -- who makes the initial determination that a third-party disclosure might be appropriate. Having made a business decision to disclose, the cable operator must secure affirmative subscriber consent before doing so. Section 222(d) takes a different, and more commercially unfriendly, approach. It requires a telecommunications carrier to give away its valuable commercial information, at the written direction of a customer, regardless of whether the carrier deems it a sound commercial decision to release the information.[24]

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[22] Absent any regulatory intervention or interpretation, the phrase "necessary" could reasonably be construed to incorporate marketplace necessities and demands.

[23] For example, if a telecommunications carrier's customer communicates that he does not want CPNI used in the manner disclosed by the carrier, the carrier (like a cable operator) should have the option of granting the customer's request and restricting the use of the CPNI or advising the customer to seek another carrier. This latter option would be appropriate, of course, only if there were another telecommunications carrier available to the customer.

[24] Section 222(d). U S WEST does not here address the questionable legality of the discrimination created between telecommunications carriers and cable providers. For the purposes of these proceedings, it is sufficient

The comparison between the Cable Act and Section 222 compels the conclusion that Congress meant for similar statutory obligations to attend to each provider's practices. Thus, the FCC should construe them similarly.

II. IF NOT REJECTED ENTIRELY, THE PROPOSAL THAT SECTION 222(C)(1)(A) BE INTERPRETED AS REFERRING TO DIFFERENT DISCRETE SERVICES SHOULD BE MODIFIED

The Section 222 that came out of Conference bears literal witness to neither the predecessor Senate or House bills (S. 652 or H.R. 1555). While the Conference Report states that the Conferees "adopt[ed] the Senate provisions with modifications,"[25] it is patent that the ultimate Section 222(c) more resembles H.R. 1555 than the prior S. 652 provision.[26] Thus, it is not surprising that the FCC finds most of its "support" for its interpretive gloss from the House Report on H.R. 1555.[27]

Section 222 does not distinguish between exchange and toll services, as H.R. 1555 did. Nor does it prohibit the use of CPNI for cross-marketing between the two. From the absence of such references, the FCC could reasonably conclude that any prior determination to differentiate between the two (determinations that were themselves referenced in the supporting House Report) had been abandoned by Congress. Section 222 also makes no specific reference to CMRS. Nor did any prior legislative history. And, it is fair to say the Conference

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to note that Section 222(d) is comparable to the FCC's current requirement that BOCs/GTE provide CPNI to those engaged in the sale of enhanced services or CPE, upon customer request. Section 222(d) simply expands the scope of the existing obligation to include other third parties offering other services. It does not, as some are arguing, require that "carriers must obtain prior permission 'in writing' from their customers in order to use CPNI for any reason not directly related to the provision of basic phone service." First! Your Story Request, Individual, Inc., Order No. 900866#. As the FCC notes, Congress used the term "written request" in Section 222(d) and the word "approval" in Section 222(c), suggesting Congress meant something different by the two terms. Notice ¶¶ 29-33.

[25] Conference Report on S. 652 at 205.

[26] NYNEX pointed this out in its Petition. See NYNEX Petition, Mar. 5, 1996 at 6-8. Furthermore, H.R. 1555 had its own legislative predecessors in bills introduced in an earlier Congress by Representative Markey. In 1994, the FCC sought additional comment on rules governing CPNI and within this context U S WEST commented on then pending statutory proposals. See 1994 Public Notice, 9 FCC Rcd. 1685 (1994). 1994 USWC Comments at 32-46. We address those statutory proposals again here at Section I.A.

[27] See House Report No. 104-204 at 89-91.

Report sheds no light on the precise meaning of the statutory provisions in question, as it merely paraphrases the language of Section 222.

While the House Report to H.R. 1555 provides some support for the FCC's tentative conclusion that certain traditional service distinctions were on Congress' mind at one point (Notice n.60), the FCC is not compelled by the references in that Report to adopt such an interpretation. While both local and interexchange service might be traditional in nature, they were not -- until relatively recent history -- "discrete services."[28] Nor will they be discrete for very long. The public interest is not served by building into a future regulatory regime the kind of market confusion[29] attendant to post-divestiture market conditions, whatever the level of competitive robustness exhibited during that time period.

The primary goal of the telecommunications provider/customer relationship is to provide quality customer service and to satisfy the needs of customers. As demonstrated above in Section I, those customer needs incorporate a strong desire to engage in one-stop shopping. To satisfy market demands, information sharing should be made as easy as possible.

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[28] Notice ¶ 23. Historically, telecommunications customers in this country were served by a single corporate infrastructure providing horizontally and vertically integrated services. No differentiation was made between local BOCs and AT&T Long Lines. It is only within recent history that different providers and different product mixes came on the scene. It is differentiated suppliers, rather than "service offerings," which are the hallmark of recent "tradition." The fact that judicial and regulatory fiats imposed strict product constraints on service providers does not necessarily argue for a market perception that the range of telephony products naturally or conveniently translates to "discrete services."

[29] There can be little doubt that customer confusion over the existence of multiple suppliers and service offerings, post divestiture, was significant. Indeed, to this day -- more than a decade after divestiture -- U S WEST continues to encounter customers who do not understand (and often do not like) the fact that there are various providers of commodities called "intraLATA" and "interLATA" service. 1991 USWC Comments at 82 and Appendix B at 6. Compare Notice n.57. The FCC's proposal would "correct" this source of market confusion.

A. Should The FCC Remain Wedded To The Notion Of Discrete Services, It Should Find Only Local And Interexchange To Be Absolutely Discrete. Carriers Should Be Permitted To Treat CMRS Either As A Discrete Service Or As A Floating One

Should the FCC persist in its position that Congress must have meant to differentiate between at least two telecommunications services, or it would not have used the phrase "the telecommunications service,"[30] the FCC should not expand the number of separate services beyond local and long-distance (Notice n.60 (where it is noted that some legislative history supports this)). The creation of each service "bucket"[31] increases the artificiality introduced into the carrier's relationship with its customers and the success of those customers' purchasing experiences.

The 1996 Act clearly acknowledges something called CMRS as a particular type of telecommunications service.[32] However, there is no indication that, **with respect to Section 222**, Congress intended for CMRS to be a separate service. As indicated above, CMRS is not treated as "separate" for purposes of product/service integration by a substantial number of telecommunications carriers. Accordingly, for many customers, a CMRS offering is but one option they might include in the telecommunications package that satisfies their needs.

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[30] The FCC arrives at its statutory interpretation, in large part, because of what it deems the power of the word "the." See Notice ¶ 21, stating that "[t]he use of the singular in this section suggests" a certain Congressional position. "The," the FCC finds, means a "singular" telecommunications service. From that determination, the FCC poses three "discrete" telecommunications services -- services which it claims are "traditional" in their nature and scope. Id. ¶¶ 22-23. Such a statutory interpretation is misplaced as a matter of construction and policy. Compare 47 USC § 551(b)(2)(A) (which uses the phrase "a cable service," but clearly incorporates various cable package offerings in the singular term). If pursued to its logical extreme, it would give rise to the most irrational and unreasonable of results. Furthermore, it is equally valid to contend that, had Congress intended to differentiate between different telecommunications services, it would not have used the singular phrase but would have phrased service differentiations in a more explicit way.

[31] The FCC does not use the term "buckets." However, its construction of the statute is substantially similar to that proposed by NYNEX. NYNEX made reference to "buckets." See NYNEX Petition at 3-4.

[32] See, e.g., 1996 Act §§ 253(e), 271(g)(3).

Thus, absent a compelling reason to hold to the contrary, the FCC should construe the statute in line with customer expectations and quality product development.[33] In interpreting Section 222, the FCC should treat CMRS flexibly. When offered by a non-integrated CMRS provider, CMRS should be considered discrete, allowing such provider the convenience of amassing and using both local and interexchange information. When offered by a LEC or IXC, however, Section 222 should be construed to allow CMRS to float, like short-haul toll.[34]

Sound public policy does not require that CMRS be deemed, in all instances and for all purposes, a separate telecommunications service under Section 222. While a discrete service approach works for those carriers whose sole business is CMR offerings (as embellished by CPE and enhanced service offerings), for integrated LECs and IXCs, such an approach makes no market sense.

CMRS is, at the same time, a service offering and a technology. The benefits of the latter should not be lost to the public due to the FCC's designation of the former as "traditionally discrete." For many customers, CMRS offerings are simply a means of receiving service akin to wireline services, but without the tether of a physical distribution plant. Particularly for the new breed of CMRS consumer (customers who happen, due to work or social demands, to be on the move (parents/children, college students, coaches/players) and who would rather communicate while so moving (alerted to the need either by a call or a page) than waiting to get back to a

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[33] McCaw/AT&T Transfer of Control Order, 9 FCC Rcd. 5836, 5886 ¶ 83 (1994) ("[W]e reject the suggestion . . . that we prohibit AT&T from disclosing its customers' CPNI to McCaw, because such a prohibition would undercut one of the benefits of the AT&T/McCaw combination: the ability . . . to offer its customers the ability to engage in 'one-stop shopping' for their telecommunications needs."); SBC Communications, Inc. et al. v. FCC, 56 F.3d 1484, 1494 (1995) ("The Commission refused to impose that limitation [prohibiting AT&T from disclosing CPNI to McCaw] because it regards AT&T/McCaw's ability to offer one-stop shopping for all of a customer's telecommunications needs as one of the benefits to the public resulting from the merger. . . . We agree with the Commission . . . that . . . the intensified price and service competition that follows is . . . a clear public benefit.").

[34] Notice ¶ 22. For this approach to be successful, the FCC would need to review and void its existing Part 22 rules restricting CPNI sharing between a BOC wireline company and its cellular affiliate. 47 CFR § 22.903(f). Those rules most certainly should be changed, and the current statutory construction rulemaking would be an appropriate opportunity to void them. See discussion below at Section IV.

wireline connection), discussion of "telecommunications service" needs will certainly include communications about how those needs are met -- *via* wireline or wireless technology, or both.

Should the FCC determine it would be inappropriate for CMRS, generally, to be a floater service across discrete service categories, it should at least permit paging and broadband PCS to do so. Paging is "used in" the provision of telecommunications service (Section 222(c)(1)(B)). And, broadband PCS is a form of exchange access, offering functionalities similar to wireline. The public interest requires that both benefit from product design and development based on access to local service CPNI and *vice versa.* Local service offerings will obviously undergo change as wireless options become more ubiquitous. The public interest requires that information about both products be well understood, as each provides a type of exchange access, so the best future generation of quality products and services can be provided to customers.[35]

B. Offerings Such As VMS And CPE Are Clearly "Used In" Or "Necessary To" The Provision Of Telecommunications Service. Thus, These Services Should Be Permitted To Share In The Intelligence Associated With CPNI

The FCC statement that, "CPNI obtained from the provision of any telecommunications service may not be used to market information services or CPE without prior customer authorization" (Notice ¶ 26), reflects an inaccurate reading of the statute. Section 222 references not only telecommunications services (Section 222(c)(1)(A)) but "services . . . used in, the provision of . . . telecommunications service" (Section 222 (c)(1)(B)).

[35] It is true that a CMRS service category would allow a CMRS provider to utilize CPNI that is local or interexchange in nature within a single product offering. The specific information gleaned from the CMRS offering could be considered, then, across two otherwise discrete services (i.e., local and interexchange). But, this kind of internal information gathering and intelligence does nothing to improve the quality of product offerings educated by cross-offering intelligence (e.g., wireline local to CMRS local; wireline interexchange to CMRS interexchange). Using information to better craft a quality market offering is commonplace. Depriving a business of the ability to engage in such product modeling and deployment harms the market in terms of efficiencies and creativity, thus harming -- rather than promoting -- the public interest.

Legislative history need not be consulted as to the meaning of Section 222(c)(1)(B).[36] Unlike (c)(1)(A), the language of (c)(1)(B) is clear on its face. It permits CPNI use for CPE and certain enhanced services offerings.

Indeed, much CPE and certain enhanced/information services (such as VMS, fax store and forward) have no relevant context beyond the telecommunications offering. Thus, carriers should be permitted to continue to make use of CPNI for both CPE and enhanced services product planning and joint marketing, in accord with the literal statutory language.

Such an interpretation is also supported by long-standing FCC findings that the public interest is benefited by such use,[37] findings that the Congressional balancing undertaken in Section 222 does not disturb. Such balancing supports a statutory interpretation that advances, rather than restricts, access and use of CPNI with respect to CPE and enhanced services.

III. IMPLIED CUSTOMER APPROVAL SHOULD BE FOUND TO EXIST ACROSS TELECOMMUNICATIONS OFFERINGS AND PROVIDERS WITHIN A SINGLE CORPORATE FAMILY. ALTERNATIVELY, CARRIERS SHOULD BE PERMITTED TO DEPLOY REASONABLE APPROVAL MECHANISMS, AS BEST SUIT THEIR CUSTOMERS' NEEDS AND THEIR BUSINESS JUDGMENT

A. Approval Mechanisms Should Be Customer Friendly And Crafted With An Appreciation Of The Dynamics Of An Existing Business Relationship

The statute mentions a number of lawful approval mechanisms (i.e., approval, oral approval, written request). But, with one exception (Section 222(d)), it does not suggest or mandate a particular type of approval.

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[36] In any event, the slim legislative history contained in the Conference Report, while not necessary to the statutory interpretation, does not suggest to the contrary. While the text of H.R. 1555 would have prohibited the use of CPNI with respect to CPE and "enhanced services" offered by integrated carriers after a date certain, there was no such suggestion in the comparable S. 652. The fact that the ultimate bill contains no such restriction, and that the Conferees claim primary reliance on the Senate Bill, suggests strongly that the Conferees meant for the language of § 222(c)(1)(B) to have its normal, plain meaning.

[37] See Notice ¶¶ 4-5. See, e.g., BOC CPE Relief Recon. Order, 3 FCC Rcd. at 25 ¶ 21 (where the FCC identified specific benefits associated with its CPNI rule *vis-à-vis* CPE: customers benefit from increased availability of efficient, integrated CPE/network service solutions; allowing the use of such information in an integrated corporation does not endow substantial competitive advantages in the CPE market; and user's privacy and confidentiality rights are fully protected).

The statute simply states that, with approval, a certain result can occur. The Conference Report sheds no light on the matter of approvals beyond paraphrasing the statute.

The FCC suggests a number of mechanisms a carrier might use to secure approval for CPNI use beyond the scope of the "discrete service" from which it was derived.[38] These mechanisms range from a written solicitation with a return postcard (Notice ¶ 29) to an "advance written notification" (id.) to oral approvals (id. ¶¶ 29-31).

Significant in its absence is the mention of tacit customer approval, based on an existing business relationship, as an appropriate statutory approval allowing for broad CPNI use.[39] Such is the foundation of the existing CPNI rules,[40] is an exceedingly market-friendly approach and is clearly not an illegitimate foundation.

As the FCC has acknowledged, albeit in different proceedings and in different contexts,[41] individuals have no material privacy concerns within the context of an existing business relationship.[42] They would not expect,

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[38] As the FCC notes, Section 222 permits broad use of CPNI if a customer "approves." Notice ¶ 27. By this statement, we do not suggest that "broad use" could not be accomplished by a proper interpretation of the term "the telecommunications service." We do mean to suggest that, **even under the FCC's "discrete services" approach**, a customer's "approval" can allow across-service marketing (including among different telecommunications services and between telecommunications and non-telecommunications services).

[39] The exact scope of this approval would depend on the specifics of the ultimately enacted rules. At a minimum, the approval could support cross-telecommunications service sharing; or, if a single telecommunications service package is adopted (so that no separate approval is necessary for information sharing between or among service components), it might support sharing of information between telephony and non-telephony carrier operations.

[40] Phase II Recon. Order, 3 FCC Rcd. at 1163 ¶ 98 ("[W]e anticipate that most of the BOCs' network service customers . . . would not object to having their CPNI made available to the BOCs to increase the competitive offerings made to such customers."). Compare TCPA Order, 7 FCC Rcd. 8752 (1992).

[41] See 47 USC §§ 201, 227. The TCPA Order contained a particular exception for conduct occurring within the context of an existing business relationship. While Congress had included such an exemption within the context of the definition of telephone solicitation, the Commission extended this exemption to other types of calls based on the finding that "a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests." TCPA Order, 7 FCC Rcd. at 8770 ¶ 34. While the FCC's observations might have been made in a context different from that under consideration, certain of its observations are more in the nature of "official notice" than statutory interpretation. Specifically, the FCC's finding that "[m]oreover, such a solicitation can be deemed to be invited or permitted by a subscriber in light of the business relationship.". Id.

then, to be asked whether business information about them can be used by a business within the confines of the relationship. Accordingly, the FCC should find that a corporate family has implied customer approval to use CPNI across services and products, absent a request to refrain from doing so, especially with respect to any Section 222 (c)(1) use. Such finding would avoid creating artificial and confusing barriers to customers' pursuits of one-stop shopping and the satisfaction of their market needs through quality relationships, products, and services.

While U S WEST believes the FCC could fashion a broad tacit approval model, should the FCC feel constrained in its ability to do so, U S WEST supports a model that would allow for a written carrier disclosure to customers for CPNI uses beyond those already authorized in Section 222(c)(1)(A) and (B). From a "privacy" perspective, Congress has already indicated that such a model would alleviate any privacy concerns.[43]

As an overall matter, the FCC should allow carriers to fashion various types of customer consent mechanisms. With a view toward customer satisfaction and the particulars of a carrier's business operations, some approval mechanisms might be oral;[44] others the result of written disclosures.

Furthermore, and of material significance, **no entity has ever proven its observations about existing business relationships false, in any proceeding before any regulatory or legislative body.**

[42] This is particularly true with respect to telecommunications companies. Traditionally, such companies have held an elevated place in consumers' minds with respect to data collection and privacy practices. See 1991 USWC Comments at 65-66 (citing to various surveys and reports wherein customers expressed opinions that such companies did not over collect information and were highly likely to maintain confidentiality).

As USWC advised the FCC in 1994, based on focus group information in our possession, individuals were well aware of the importance of personal information to a business and were quite comfortable with uses that they agreed to either directly or by implied consent. 1994 USWC Comments at 10-12.

[43] Obviously, in enacting 47 USC § 551, Congress determined that a customer notification was sufficient privacy protection for individuals in an existing business relationship.

[44] As the FCC notes, the 1996 Act identifies one circumstance in which an "oral" approval would, most certainly, be appropriate. Notice ¶ 31. That subsection should not be construed, however, to prohibit a telecommunications carrier, in the act of securing an otherwise appropriate inbound telemarketing oral approval, from using that call-in as an opportunity to secure a broader, omnibus information-use approval. Such would be contrary to predictable business/consumer relationship expectations. Nor should the fact that an "oral" approval is mentioned within one context preclude its use in other contexts (e.g., outbound calling to secure oral approvals).

While oral approvals are clearly lawful under the statute, they present a problem because either they will be

The FCC should not prescribe the form of a written disclosure or notification by "specify[ing] the information that should be included in the customer notification." (Notice ¶ 28). As Commissioner Hundt has correctly observed, it is not government's role to tell business how to communicate with customers,[45] although consumers can play a meaningful role by advising the FCC if communications are not effective. Carriers should have flexibility with respect to the text and format of written disclosures, so long as those disclosures meet certain minimum requirements (i.e., similar to the Cable Act notices).

Should carriers pursue approvals through written instruments, they should be permitted to provide a one-time notice to customers,[46] describing fully and fairly the proposed carrier use of CPNI (including use across services (including enhanced services, CPE, and cable telephony and cable/OVS entertainment services) and across affiliated companies); said disclosure advising customers of their right not to have CPNI so used. Clearly, this is "the least burdensome method of notification." (Notice ¶ 28).

Even this approval mechanism will create customer confusion[47] and generate unnecessary paper. Nevertheless, it is supported by similar Congressional industry requirements. Accordingly, if the FCC orders the

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isolated to one type of calling pattern (the inbound calling suggested by § 222(d)(3)) or will be tremendously expensive to obtain. Therefore, telecommunications carriers will undoubtedly look for other approval vehicles to reach their broader customer base.

[45] See June 6, 1994 Cable Monitor at page 6, regarding Hundt speech to Consumer Federation of America (on May 26) (commenting on letters from cable companies to consumers pertaining to 1992 cable rate re-regulation).

[46] We urge that it be a one-time notice. While there is precedent for the notion that "privacy protection" requires "annual" disclosures (compare 47 USC § 551(a)(1)), such is not a professed market need. If all telecommunications carriers in the United States are required to provide their customers with a one-time notice of their CPNI rights, under the FCC's "discrete services" approach, customers will receive at least two and maybe three notices. Receiving these notices every year is simply unnecessary, as the entire national customer base will have been notified as to carrier practices. As moves and changes occur, customers can inquire into other carrier practices, should they be interested, or carriers might develop, in response to market demand, written information policies that new customers receive.

[47] U S WEST currently submits CPNI notifications to business customers with fewer than 20 lines, due to the cost of segregating business customers. As early stated, these customers demonstrate significant confusion over the information provided to them. See 1991 USWC Comments at 79-80 and n.252. Sometimes these customers

use of written instruments to consumers, as part of the approval process, it should adopt this least intrusive form of notice.

Carriers should not be mandated to construct disclosures that look toward the securing of affirmative customer approval, (either orally or in writing). While some carriers might voluntarily choose such a model, the difficulties of securing affirmative approvals -- particularly from mass market consumers -- is formidable, perhaps impossible.[48] Given the unprecedented commercial practice of a business seeking affirmative customer approval to use its own commercial business information, and the expected operation of inertia which would result in few returned writings,[49] the FCC should not mandate such a model. Indeed, a contrary decision would raise significant constitutional First Amendment[50] and Takings issues.[51]

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restrict their CPNI on the theory that such action will take them off of marketing lists -- which it will not. 1994 USWC Comments at 23-24 and n.46 (discussing the small business CPNI notice and the BNA notification that we were mandated by the FCC to send out. U S WEST sent out between 10 and 11 million customer BNA notifications. We received 27,600 calls to the posted-800 number (for BNA restriction), but only 1,050 of those customers actually restricted BNA information. The remainder were calling to get off marketing lists. After explaining that the one had little to do with the other, and explaining the consequences of BNA restriction, the vast majority of the responding customers chose not to restrict BNA information.

[48] In the record of the 1994 Public Notice, 9 FCC Rcd. 1685, USWC outlined an attempt to get signed writings with respect to the continuation of service that consumers were receiving -- a factual situation suggesting high consumer interest and motivation to communicate. See 1994 USWC Comments, Appendix A at 85-89. And see Application for Approval of Implementation Procedure, In the Matter of the Application of the Mountain States Telephone and Telegraph Company for an Order Approving Implementation Procedure, Case U-1000-92, Idaho Public Utilities Commission. Despite that expectation, the number of written approvals received was abysmally low. To suggest that written approvals might be returned within the context of an abstract "terms and conditions" notification lacks any credibility and can be supported by no demonstrative evidence.

[49] Time after time, except in the most limited of circumstances, the FCC has acknowledged the lack of necessity for, and the unlikely success of, a customer written prior authorization regime. See Appendix A.

[50] See Edenfield v. Fane, 113 S. Ct. 1792, 1798 (1993); Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1592 (1995).

[51] See Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862 (1984).

B. Authorized Section 222(c)(1) Uses Must Be Broadly Construed To Avoid The Potential Discriminatory Effect Of Section 222(c)(3)

Section 222(c) uses must be construed broadly, including those uses allowed pursuant to customer "approval." LECs should not be forced to release commercially valuable trade secret information to third parties, including their competitors, while their competitors have no comparable obligation. A permitted Section 222(c)(1) use for individually identifiable CPNI, whether secured through statutory authorization (e.g., Section 222(c)(1)(A) or (c)(1)(B)) or separate customer approval), must be construed to result in any aggregation of that CPNI being free of any strictures to share the information with others (see Section 222 (c)(3)).

Such reading comports with legislative interpretation precepts that require legislation to be construed in accord with constitutional mandates. The FCC should not construe Section 222(c)(3) to require LECs to provide their valuable commercial information to third parties except in the most extreme of circumstances. Nor should it promote a statutory interpretation that exacerbates the differences in treatment between LECs and non-LECs and LECs and cable operators (47 USC Section 551(c)). Section 222(c) uses and purposes must be broadly construed in order to avoid Takings and Equal Protection issues.[52]

IV. THE FCC SHOULD VOID ITS EXISTING CPNI RULES, WITH RESPECT TO CPE, ENHANCED SERVICES, AND CELLULAR SERVICE, AS THE STATUTE COVERS THE FIELD IN AN ALREADY COMPETITIVELY BALANCED, INDUSTRY NEUTRAL MANNER

The FCC notes that its existing CPNI rules have continued validity pending the instant Rulemaking, to the extent they are not superseded by the 1996 Act (Notice ¶ 3). This conclusion is not surprising, given traditional statutory construction theory. However, the FCC's suggestion that there might be dual or different sets of

[52] See note 50 infra. And see Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985).